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6 UNITED STATES DISTRICT COURT

7 DISTRICT OF NEVADA

8 \* \* \*

9 SHAWN GOODE,

Case No. 3:18-cv-00362-RCJ-CSD

10 Petitioner, ORDER

11 v.

12 RUSSELL PERRY, et al.,

13 Respondents.  
14

15 Shawn Goode's pro se 28 U.S.C. § 2254 habeas corpus petition is before the  
16 court for final adjudication on the merits (ECF No. 7). As discussed below, the petition  
17 is denied.

18 **I. Background & Procedural History**

19 In August 2012, a jury found Goode guilty of 4 counts of robbery with use of a  
20 deadly weapon and 4 counts of burglary with a firearm (exhibit 40).<sup>1</sup> The convictions  
21 stemmed from robberies in Reno, Nevada at two dry cleaners, a bakery, and a cellular  
22 phone store during which he brandished an Airsoft gun. The state district court  
23 sentenced him to terms amounting to approximately 15 to 90 years. Exh. 47.  
24 Judgment of conviction was filed on November 6, 2012. Exh. 46.

25 The Nevada Supreme Court affirmed Goode's convictions, and the Nevada Court  
26 of Appeals affirmed the denial of his state postconviction habeas corpus petition. Exhs.

27  
28 <sup>1</sup> Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 11, and  
are found at ECF Nos. 12-15.

77, 152. Goode dispatched his federal habeas corpus petition for filing in July 2018 (ECF No. 7). Respondents have now answered the remaining claims, and Goode has replied (ECF Nos. 34, 37).

## II. Legal Standard

### AEDPA Standard of Review

28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA), provides the legal standards for this court's consideration of the petition in this case:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). This court’s ability to grant a writ is limited to cases where “there is no possibility fair-minded jurists could disagree that the state court’s decision conflicts with [Supreme Court] precedents.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Supreme Court has emphasized “that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA standard as “a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt”) (internal quotation marks and citations omitted).

1 A state court decision is contrary to clearly established Supreme Court precedent,  
 2 within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts  
 3 the governing law set forth in [the Supreme Court’s] cases” or “if the state court  
 4 confronts a set of facts that are materially indistinguishable from a decision of [the  
 5 Supreme Court] and nevertheless arrives at a result different from [the Supreme  
 6 Court’s] precedent.” *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362,  
 7 405-06 (2000), and citing *Bell*, 535 U.S. at 694.

8 A state court decision is an unreasonable application of clearly established Supreme  
 9 Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies  
 10 the correct governing legal principle from [the Supreme Court’s] decisions but  
 11 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538  
 12 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause  
 13 requires the state court decision to be more than incorrect or erroneous; the state  
 14 court’s application of clearly established law must be objectively unreasonable. *Id.*  
 15 (quoting *Williams*, 529 U.S. at 409).

16 To the extent that the state court’s factual findings are challenged, the  
 17 “unreasonable determination of fact” clause of § 2254(d)(2) controls on federal habeas  
 18 review. *E.g.*, *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004). This clause  
 19 requires that the federal courts “must be particularly deferential” to state court factual  
 20 determinations. *Id.* The governing standard is not satisfied by a showing merely that the  
 21 state court finding was “clearly erroneous.” 393 F.3d at 973. Rather, AEDPA requires  
 22 substantially more deference:

23 .... [I]n concluding that a state-court finding is unsupported by  
 24 substantial evidence in the state-court record, it is not enough that we  
 25 would reverse in similar circumstances if this were an appeal from a  
 26 district court decision. Rather, we must be convinced that an appellate  
 panel, applying the normal standards of appellate review, could not  
 reasonably conclude that the finding is supported by the record.

27 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.2004); see also *Lambert*, 393  
 28 F.3d at 972.

Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be correct unless rebutted by clear and convincing evidence. The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to habeas relief. *Cullen*, 563 U.S. at 181.

### III. Instant Petition

#### a. Claims Raised on Direct Appeal

##### Ground 6

Goode claims that the State presented insufficient evidence to convict him of use of a “firearm” or “deadly weapon” in violation of his Fifth Amendment due process rights (ECF No. 7, pp. 29-31). He alleges that the jury instructions on what constitutes a deadly weapon or firearm relieved the prosecution of its burden of proof regarding whether the Airsoft gun –which Goode refers to as a “toy gun” --was designed to be used as a deadly weapon and whether it met the statutory definition of a firearm.

“The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (citing *In re Winship*, 397 U.S. 358 (1970)). On federal habeas corpus review of a judgment of conviction pursuant to 28 U.S.C. § 2254, the petitioner “is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” *Id.* at 324. “[T]he standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.” *Id.* at 324 n.16. On habeas review, this court must assume that the trier of fact resolved any evidentiary conflicts in favor of the prosecution and must defer to such resolution. *Id.* at 326. Generally, the credibility of witnesses is beyond the scope of a review of the sufficiency of the evidence. *Schlup v. Delo*, 513 U.S. 298, 330 (1995).

At Goode’s trial, Stephanie Ozuna testified that she was working at a Cricket wireless store on October 1, 2011, when a man came in wearing a Scream mask and all

1 black clothing. Exh. 31, pp. 87-101.<sup>2</sup> He made Ozuna open the cash registers, and he  
2 emptied them. Ozuna saw that he was holding a gun at his side, which he lifted slightly  
3 when he was directing her.

4 Oliver Espino and his girlfriend Sally Erisey both testified that they were eating at an  
5 outside table at a restaurant next to the Cricket store that day. Exh. 32, pp. 6-30.  
6 Espino saw a man wearing a black hoodie and carrying a gun put on a mask and enter  
7 the Cricket store. Shortly thereafter, the man emerged, took off his mask, smiled at the  
8 two, and ran. A brown Jeep Cherokee then sped out of a neighboring parking lot. Both  
9 Espino and Erisey identified Goode as the robber with one hundred percent certainty.

10 Young Son testified that she and her husband owned a dry cleaners. Exh. 29, pp.  
11 14-28. On February 23, 2012, a man walked in wearing a dark hoodie and a mask,  
12 showed her his gun, and told her to open the register and go to the back of the store.  
13 He emptied the register and left.

14 Zak Gilbert testified that on February 26, 2012, he came out of the back office of the  
15 bakery he owns and was confronted by a man wearing a dark hoodie and a ski mask.  
16 *Id.* at 72-96. Gilbert noticed that the man had very blue eyes. The man partially pulled a  
17 gun out of his pocket and told Gilbert that this was a robbery. He directed Gilbert to  
18 open the cash register and then go into the restroom. When Gilbert heard the man  
19 leave, he followed him out the back door. He saw a dark Jeep Cherokee with no license  
20 plate drive very fast out of the parking lot. Gilbert jumped into his car and pursued the  
21 Jeep. He caught up to the man at an intersection and got a good view of him without a  
22 mask. He later identified Goode and one other man from a photo lineup as the possible  
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24  
25 <sup>2</sup> The court makes no credibility findings or other factual findings regarding the truth or  
26 falsity of evidence or statements of fact in the state court record. The court summarizes the same  
27 solely as background to the issues presented in this case, and it does not summarize all such  
28 material. No assertion of fact made in describing statements, testimony, or other evidence in the  
state court constitutes a finding by this court. Any absence of mention of a specific piece of  
evidence or category of evidence does not signify the court overlooked it in considering Goode's  
claims.

1 perpetrators. Gilbert testified that when he saw Goode in person, he was one hundred  
2 percent certain Goode was the robber.

3 Hank Jin, owner of another dry cleaners, testified that on March 1, 2012, a man  
4 entered his store. *Id.* at 122-133. The man left the store, then came back in with a mask,  
5 showed Jin a gun and told him to open the cash register. The man wore a black hoodie,  
6 black mask, and had blue eyes. When the man left, Jin followed him outside and saw  
7 him without a mask. Jin said he was one hundred percent certain Goode was the  
8 robber.

9 Matthew Noedel, a forensic scientist and Washoe County Crime Laboratory  
10 consultant, testified that he was specifically tasked by the crime lab to examine the  
11 weapon in question to determine whether it was capable of or designed to fire a metallic  
12 projectile by means of spraying gas or air. Exh. 31, pp. 52-86. He explained that the  
13 weapon was an Airsoft gun, a more modern version of old-fashioned BB guns. He said  
14 that the weapon had a pressurized cartridge so that when you pull the trigger a burst of  
15 CO-2 is released, which pushes a pellet out and down the barrel. The prosecutor asked:  
16 "Is this weapon designed to be capable of firing a metallic projectile, either a pellet or a  
17 BB-type metallic projectile?" And Noedel responded: "Yes, it can." *Id.* at 59. He also  
18 documented how close it looked to an actual, lethal type of firearm. The Airsoft comes  
19 with a "blaze orange" tip to distinguish it from an actual gun, but the orange tip had been  
20 removed from the weapon in question. Noedel acknowledged on cross-examination that  
21 he had never personally fired a metallic projectile from an Airsoft gun.

22 NRS 193.165(1) provides that an provides that an "additional penalty" of "not less  
23 than 1 year and a maximum term of not more than 20 years" may be imposed upon  
24 "any person who uses a firearm or other deadly weapon . . . in the commission of a  
25 crime." NRS 193.165(6) provides:  
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28

6. As used in this section, “deadly weapon” means:

(a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;

(b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or

(c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.

The relevant version of NRS 202.265(5)(b) defined a firearm:

(b) “Firearm” includes any device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force.

Jury instructions mirrored the statutory definitions of deadly weapon and firearm. Exh. 38, jury instruction nos. 22, 23. See discussion of ground 5 below.

The Nevada Supreme Court concluded that substantial evidence supported the verdict:

. . . . Goode argues that the evidence presented at trial was insufficient to support the use of a deadly weapon or firearm enhancements. At trial, the State elicited testimony from a firearms expert that he had examined the device used and determined that it was capable of firing a metallic projectile. The jury could reasonably infer from this testimony that the device used was capable of firing a metallic projectile and therefore qualified as a firearm under NRS 202.265(5)(b) and consequently a deadly weapon under NRS 193.165(6)(c). [FN 3]. It is for the jury to “assess the weight of the evidence and determine the credibility of witnesses,” and the jury’s verdict will not be disturbed on appeal where substantial evidence supports the verdict. *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); see also *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

[FN 3: To the extent that Goode argues that the expert agreed with his counsel’s classification of the device as a “toy” or that the device was merely feared to be a deadly weapon but was only a replica, the jury received instructions defining a firearm and a deadly weapon and concluded that the device satisfied the definitions.]

Exh. 77, p. 5.

1 A forensic scientist testified specifically that the Airsoft gun used in the robberies  
 2 was capable of firing a metallic projectile. Goode has not shown that no rational trier of  
 3 fact could have found proof of guilt beyond a reasonable doubt with respect to the  
 4 deadly weapon enhancement. *Jackson*, 443 U.S. at 324. He has failed to demonstrate  
 5 that the Nevada Supreme Court decision on federal ground 6 was contrary to, or  
 6 involved an unreasonable application of, clearly established U.S. Supreme Court law, or  
 7 was based on an unreasonable determination of the facts in light of the evidence  
 8 presented in the state court proceeding. 28 U.S.C. § 2254(d). Accordingly, relief on  
 9 ground 6 is denied.

#### 10 **Ground 7**

11 Goode contends that the prosecutor committed misconduct during closing  
 12 arguments (ECF No. 7, pp. 32-35). Goode insists that the deputy district attorney  
 13 improperly stated the “Law takes the perpetrator, the robber, at his word,” referenced  
 14 “Fear” and the “leveling of the playing Field,” and improperly referenced “our citizens,”  
 15 when arguing that the Airsoft gun was a deadly weapon under Nevada law.

16 Prosecutorial misconduct may “so infec[t] the trial with unfairness as to make the  
 17 resulting conviction a denial of due process.” *Greer v. Miller*, 483 U.S. 756, 765 (1987),  
 18 quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). To constitute a due  
 19 process violation, the prosecutorial misconduct must be “of sufficient significance to  
 20 result in the denial of the defendant’s right to a fair trial.” *Greer*, 483 U.S. at 765,  
 21 quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985).

22 The Supreme Court has measured the fairness of the petitioner’s trial by considering  
 23 (1) whether the prosecutor’s comments manipulated or misstated the evidence or  
 24 implicated other specific constitutional rights of the accused; (2) whether the trial court  
 25 gave a curative instruction; and (3) the weight of the evidence against the accused.  
 26 *Darden v. Wainwright*, 477 U.S. 168, 181- 82 (1986). The court must distinguish ordinary  
 27 trial error of a prosecutor from that sort of egregious misconduct which amounts to a  
 28 constitutional denial of due process. *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Due



1 process violations warranting federal intervention are found “only where criminal trials in  
 2 state courts are conducted in such a manner as amounts to a disregard of that  
 3 fundamental fairness essential to the very concept of justice.” *Pike v. Dickson*, 323 F.2d  
 4 856, 860 (9<sup>th</sup> Cir. 1963) (citation omitted). The question before the court is not whether  
 5 misconduct denied a fair trial, but whether the state court’s conclusion was an  
 6 unreasonable application of clearly established federal law under 28 U.S.C. §  
 7 2254(d)(1); *see also Frazier v. Huffman*, 343 F.3d 780, 793 (6<sup>th</sup> Cir. 2003).

8 During closing arguments, the prosecutor argued that an Airsoft gun is a firearm and  
 9 deadly weapon under state statutes. Exh. 37, pp. 4-32 (rebuttal pp. 33-44). He  
 10 emphasized that under state law, any device, loaded or unloaded, which is operable or  
 11 inoperable, from which a metallic projectile, including a ball bearing or pellet, may be  
 12 expelled by spring, gas, air or other force is considered a firearm. *Id.* at 12-13, 33-35.  
 13 He also pointed out that without the blaze orange tip, the Airsoft gun looks just like a  
 14 real gun. He also said “the law takes the perpetrator, the robber, at his word; right? ‘I  
 15 have a gun.’ He’s acting like he has a gun.” *Id.* at 13. The prosecutor continued:

16 Take that one step further: How many of these 911 calls do you hear  
 17 people say, “He had a gun?,” The law says: We’re not going to make the  
 18 victim wait and test. What’s the test for? Is the gun he’s threatening you  
 19 with, the gun that he says he had, is the gun he’s menacing you with? Is  
 20 that a real gun; right? Does the law expect -- or does reasonable society  
 21 expect people to test see if it’s a real gun first, before I give up my money?  
 22 Well, that’s unreasonable, because the test for that is death; right? You’re  
 23 going to wait, you’re going to -- well, if you’re wrong, you get shot; right?  
 24 That is not a reasonable thing for society, for our citizens to have to  
 25 undergo.

26 So that is another reason why we have this. It’s a deadly wager. We  
 27 don’t expect that from business owners. And they inflict the same fear as  
 28 traditional firearms, don’t they? We heard a lot about the fear. Of course  
 Stephanie Ozuna could barely speak -- she couldn’t speak. She couldn’t  
 even tell her manager what happened.

Oliver Espino, who doesn’t even know her, said this girl couldn’t even  
 talk, right ? So these BB guns -- toys they might be called during the  
 defense argument -- they have the same effect as the real deal.

1 So the law says: Let's level the playing field here. If a bad guy wants to  
 2 use a BB gun just like it's a deadly – like a true firearm, we will take him at  
 3 his word, and we'll hold him accountable for that. Because otherwise, he  
 4 would get the entire benefit of: Looks like a gun; right? It inflicts the same  
 5 fear. He would get the same benefit, but then when it comes back to it, he  
 6 would sort of say, like the criminal subculture, "Well, hey, it was just a BB  
 7 gun. Don't worry about it; right? There's no armed robbery, it's just a  
 8 simple robbery, because I couldn't have killed you; right?" Another way the  
 9 law levels the playing field. We don't expect that of our citizens. And that is  
 10 what the law – So if you hear arguments, it comes up, and anticipate that  
 11 it will, it will be an argument, or part of your deliberations, well, is this a  
 12 deadly weapon? Or is this an armed robbery, or is it a simple robbery?  
 13 The answer in these instructions, that I just went over, tell you it is a  
 14 deadly weapon, this is an armed robbery. Because the playing field is  
 15 leveled; right?

16 *Id.* at 13-15.

17 The Nevada Supreme Court rejected this claim on direct appeal:

18 . . . . Goode alleges that the prosecutor engaged in misconduct during  
 19 his closing argument with regard to his comments on what constitutes a  
 20 deadly weapon. Goode claims that the prosecutor misstated the law when  
 21 he argued that because the device looked like a firearm, it should be  
 22 considered a firearm. We review for plain error as Goode failed to  
 23 preserve this issue. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465,  
 24 477 (2008). "Under that standard, an error that is plain from a review of  
 25 the record does not require reversal unless the defendant demonstrates  
 26 that the error affected his or her substantial rights, by causing actual  
 27 prejudice or a miscarriage of justice." *Id.* (internal quotation marks  
 28 omitted). "A prosecutor's comments should be considered in context, and  
 'a criminal conviction is not to be lightly overturned on the basis of a  
 prosecutor's comments standing alone.'" *Leonard v. State*, 117 Nev. 53,  
 81, 17 P.3d 397, 414 (2001) (quoting *United States v. Young*, 470 U.S. 1,  
 11 (1985)). Considering the prosecutor's comments in context, we  
 conclude that Goode has failed to demonstrate reversible plain error.

Exh. 77, pp. 5-6.

Goode fails to demonstrate that the Nevada Supreme Court's decision that  
 federal ground 7 lacks merit was contrary to, or an unreasonable application of, clearly  
 established federal law. The prosecutor's comments about the effect on the victim of  
 seeing something that looks like a gun were delivered in the context of trying to explain  
 part of the state legislature's rationale in enacting a law prescribing that a type of BB  
 gun could be considered a firearm and thus a deadly weapon. As discussed above with

1 respect to ground 6, substantial evidence was presented that Goode used the Airsoft  
2 gun in perpetration of the robberies and that the weapon is a deadly weapon under  
3 state law. This court does not view the prosecutor's arguments as improper. But even  
4 assuming, *arguendo*, that the comments were inappropriate, Goode has not shown that  
5 any error "had substantial and injurious effect or influence in determining the jury's  
6 verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) (*i.e.*, harmless error  
7 analysis). Federal habeas relief, therefore, is denied as to ground 7.

8 **b. Ineffective Assistance of Counsel Claims**

9  
10 Two claims of ineffective assistance of counsel (IAC) are before the court. IAC  
11 claims are governed by the two-part test announced in *Strickland v. Washington*, 466  
12 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a petitioner claiming  
13 ineffective assistance of counsel has the burden of demonstrating that (1) the attorney  
14 made errors so serious that he or she was not functioning as the "counsel" guaranteed  
15 by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense.  
16 *Williams*, 529 U.S. at 390-91 (citing *Strickland*, 466 U.S. at 687). To establish  
17 ineffectiveness, the defendant must show that counsel's representation fell below an  
18 objective standard of reasonableness. *Id.* To establish prejudice, the defendant must  
19 show that there is a reasonable probability that, but for counsel's unprofessional errors,  
20 the result of the proceeding would have been different. *Id.* A reasonable probability is  
21 "probability sufficient to undermine confidence in the outcome." *Id.* Additionally, any  
22 review of the attorney's performance must be "highly deferential" and must adopt  
23 counsel's perspective at the time of the challenged conduct, in order to avoid the  
24 distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's burden to  
25 overcome the presumption that counsel's actions might be considered sound trial  
26 strategy. *Id.*

1 Ineffective assistance of counsel under *Strickland* requires a showing of deficient  
2 performance of counsel resulting in prejudice, “with performance being measured  
3 against an objective standard of reasonableness, . . . under prevailing professional  
4 norms.” *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations  
5 omitted). When the ineffective assistance of counsel claim is based on a challenge to a  
6 guilty plea, the *Strickland* prejudice prong requires a petitioner to demonstrate “that  
7 there is a reasonable probability that, but for counsel’s errors, he would not have  
8 pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52,  
9 59 (1985).

11 If the state court has already rejected an ineffective assistance claim, a federal  
12 habeas court may only grant relief if that decision was contrary to, or an unreasonable  
13 application of, the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003).  
14 There is a strong presumption that counsel’s conduct falls within the wide range of  
15 reasonable professional assistance. *Id.*

17 The United States Supreme Court has described federal review of a state supreme  
18 court’s decision on a claim of ineffective assistance of counsel as “doubly deferential.”  
19 *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).  
20 The Supreme Court emphasized that: “We take a ‘highly deferential’ look at counsel’s  
21 performance . . . through the ‘deferential lens of § 2254(d).” *Id.* at 1403 (internal  
22 citations omitted). Moreover, federal habeas review of an ineffective assistance of  
23 counsel claim is limited to the record before the state court that adjudicated the claim on  
24 the merits. *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has  
25 specifically reaffirmed the extensive deference owed to a state court’s decision  
26 regarding claims of ineffective assistance of counsel:  
27  
28

1 Establishing that a state court's application of *Strickland* was  
2 unreasonable under § 2254(d) is all the more difficult. The standards  
3 created by *Strickland* and § 2254(d) are both "highly deferential," *id.* at  
4 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct.  
5 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review  
6 is "doubly" so, *Knowles*, 556 U.S. at 123. The *Strickland* standard is a  
7 general one, so the range of reasonable applications is substantial. 556  
8 U.S. at 124. Federal habeas courts must guard against the danger of  
9 equating unreasonableness under *Strickland* with unreasonableness  
10 under § 2254(d). When § 2254(d) applies, the question is whether there is  
11 any reasonable argument that counsel satisfied *Strickland's* deferential  
12 standard.

13 *Harrington*, 562 U.S. at 105. "A court considering a claim of ineffective assistance of  
14 counsel must apply a 'strong presumption' that counsel's representation was within the  
15 'wide range' of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*, 466  
16 U.S. at 689). "The question is whether an attorney's representation amounted to  
17 incompetence under prevailing professional norms, not whether it deviated from best  
18 practices or most common custom." *Id.* (internal quotations and citations omitted).

#### 13 **Ground 4**

14 Goode claims that his counsel was ineffective for failing to file a motion to declare  
15 and enforce the plea agreement (ECF No. 7, pp. 22-25).

16 At the evidentiary hearing on Goode's state postconviction habeas petition, his  
17 trial counsel testified that the State offered a plea deal with an aggregate sentence of 10  
18 to 25 years on July 13, 2012, and they indicated that the offer would expire on July 30.  
19 Exh. 114, pp.15-25. Counsel testified that on July 27 Goode indicated to him that he  
20 rejected the deal. Exh. 123, pp. 6-26. Counsel already had a meeting set up with Goode  
21 for July 31 and on that day, Goode told him he had changed his mind and wanted to  
22 accept the deal. Counsel immediately called the prosecutor's office and left a voicemail  
23 explaining that Goode wished to accept the plea deal. When counsel reached the  
24 prosecutor on the morning of August 1, the prosecutor told him the deal had expired.

25 Goode testified that he was arrested on March 1, 2012. Exh. 114, pp. 26-45. He  
26 stated that at a March 5 hearing, he informed the deputy public defender that he would  
27 accept a plea deal after he met with his actual public defender and reviewed the  
28 discovery. Multiple attorneys were conflicted out and Goode's ultimate trial counsel

1 informed him of the State's offer of 10 to 25 years. He testified that he wanted to accept  
2 the deal, but he had an issue with the restitution. He was asked on direct examination:  
3 "Did there come a point in time when you agreed to accept the offer that [the State] had  
4 made?" He responded: "Yes. I did want to accept the deal, on the condition that I  
5 wouldn't be responsible for all the restitution." *Id.* at 34. He maintained that he was  
6 innocent of the Cricket robbery and thus thought it unfair that he would pay restitution  
7 related to that crime. Goode testified that it was his understanding that his counsel  
8 conveyed that acceptance or conditional acceptance to the district attorney.

9 The prosecutor who proffered the July 13, 2012, offer of 10 to 25 years testified  
10 that the offer was never accepted, nor did the defense make any counteroffer. *Id.* at 59-  
11 61. The prosecutor noted that he would never have agreed to a deal that did not include  
12 Goode admitting guilt for the Cricket robbery. Goode's counsel also testified that he and  
13 his client did not discuss the issue of restitution, "not once, not ever." Exh. 123, p. 16.

14 The Nevada Court of Appeals affirmed the denial of this claim in Goode's state  
15 petition:

16 First, Goode claimed counsel was ineffective for failing to file a motion  
17 to declare and enforce the plea agreement. Goode failed to demonstrate  
18 counsel was deficient or resulting prejudice. The district court held an  
19 evidentiary hearing and made the following findings: an offer was  
20 extended on July 13, 2012, and was set to expire on July 30, 2012; as of  
21 July 27, 2012, Goode rejected the offer; he did not attempt to accept the  
22 offer until July 31, 2012; and the State rejected the acceptance because it  
was one day late. The district court concluded the State is the master of its  
offer and the district court is powerless to participate in the plea  
negotiations. *See State v. Crockett*, 110 Nev, 838, 843, 877 P.2d 1077,  
1079 (1994). Therefore, the district court denied this claim.

23 We conclude substantial evidence supports the decision of the district  
24 court. Goode failed to demonstrate counsel should have filed a motion to  
25 declare and enforce the plea agreement or that such a motion would have  
26 been successful. Plea agreements are generally governed by contract  
27 principles. [FN 1.] *Id.* at 842, 877 P.2d at 1079. The plea agreement was  
28 not accepted by Goode within the reasonable time limit set by the State.  
Therefore, there was no plea agreement to declare and enforce. *See id.* at  
843, 877 P.2d at 1079 ("As a general rule, then, we think that either party  
would be entitled to modify its position or even withdraw its consent to the  
bargain until the plea is tendered and the bargain as it then exists is

accepted by the court.” quoting *United States v. Savage*, 978 F.2d 1136, 1138 (9<sup>th</sup> Cir. 1992)). Accordingly, we conclude the district court did not err by denying this claim.

[FN 1: We decline Goode’s request to revisit, overrule, or limit *Crockett*.]

Exh. 152, pp. 3-4.

Goode presents no credible evidence that a plea agreement existed to enforce. The records and recollections testified to by both his counsel and the prosecutor reflect that a plea offer expired on July 30, and Goode attempted to accept the offer on July 31. He has failed to demonstrate that the Nevada Court of Appeals’ decision on federal ground 4 was contrary to or involved an unreasonable application of *Strickland* or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). The court denies federal habeas relief on ground 4.

### **Ground 5**

Goode argues that his counsel was ineffective for failing to object to the jury instructions regarding a deadly weapon because there was no evidence that the Airsoft gun in question was operable (ECF No. 7, pp. 25-29).

Jury instruction no. 22 stated:

“Deadly weapon” means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; a gun, pistol, spring pistol, revolver or other firearm; any dirk, dirk-knife, sword, sword cane, or any knife which is made an integral part of a belt buckle or any instrument or weapon of the kind commonly known as a slung shot, sand club, sandbag or machete.

You are instructed that a firearm is a deadly weapon.

Jury instruction no. 23 provided:

“Firearm” means:



1. Any device, whether loaded or unloaded, operable or inoperable, designed to be used as a weapon from which a projectile may be expelled through the barrel by the force of any explosion or other form of combustion; or
2. Any device, whether loaded or unloaded, operable or inoperable, from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force.

Whether the weapon was unloaded or inoperable at the time of the crime is irrelevant.

Exh. 38, pp. 26-27.

Goode argued that *McIntyre v. State*, 764 P.2d 482, 483 (Nev. 1988), and *Bias v. State*, 784 P.2d 963, 964 (Nev. 1989), support his contention that the State had to prove his so-called toy gun had deadly capabilities at the time of the crime for the toy gun to qualify as a deadly weapon. Subsequently, however, in 2009, the Nevada Supreme Court concluded that if a weapon meets the statutory definition of firearm, it is a deadly weapon under state law regardless of whether it is unloaded or inoperable. *Berry v. State* 212 P.3d 1085, 1089 (Nev. 2009) (abrogated on other grounds by *State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010)).

The Nevada Court of Appeals affirmed the denial of this claim:

Goode claimed counsel was ineffective for failing to object to jury instructions regarding the deadly weapon enhancement and for failing to propose instructions regarding the operability of the Airsoft gun. Goode claims counsel should have proposed an instruction stating “you are instructed that a toy firearm can be a deadly weapon within the meaning of this instruction, but only if at the time of the offense(s) the Defendant was capable of using it in a way to inflict death or great bodily harm.” Goode claims this language is in line with *McIntyre v. State*, 104 Nev. 622, 624, 764 P.2d 482, 483 (1988), and *Bias v. State*, 105 Nev. 869, 871, 784 P.2d 963, 964 (1989), which he claims say a toy gun cannot be a firearm unless the toy gun is proven to have actual deadly capabilities at the time of the crime. [FN 2].

[FN 2: The gun used in this case was an Airsoft pistol and there was testimony presented at trial that it was capable, at the time it was purchased, of firing a metallic object. See *Goode v. State*, Docket No. 62224 (Order of Affirmance, September 18, 2013).]



1 The district court concluded this was not the correct standard because  
 2 of amendments made to the deadly weapon statute, see NRS 193.165,  
 3 and subsequent case law interpreting that statute, see *Berry v. State*, 125  
 4 Nev. 265, 276-77, 212 P.3d 1085, 1093 (2009) abrogated on other  
 5 grounds by *State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010).  
 6 Specifically, *Berry* states a firearm is a deadly weapon if it meets the  
 7 statutory definition regardless of whether it was unloaded or inoperable at  
 8 the time of the crime. *Id.* Substantial evidence supports the decision of the  
 9 district court, and we conclude the district court did not err by denying this  
 10 claim.

11 Exh. 152, 4-5.

12 Goode's arguments that the weapon he used was not a deadly weapon because it  
 13 was inoperable at the time of the crimes is unavailing under relevant state statute and  
 14 state case law. His counsel was not ineffective for failing to object to jury instructions  
 15 that properly stated Nevada law or for not proffering instructions that were contrary to  
 16 Nevada law. Goode has not shown that the Nevada Court of Appeals' decision on  
 17 federal ground 5 was contrary to or involved an unreasonable application of *Strickland*  
 18 or was based on an unreasonable determination of the facts in light of the evidence  
 19 presented in the state court proceeding. 28 U.S.C. § 2254(d). Federal habeas relief is  
 20 denied as to ground 5.

21 The petition, therefore, is denied in its entirety.

#### 22 **IV. Certificate of Appealability**

23 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules  
 24 Governing Section 2254 Cases requires this court to issue or deny a certificate of  
 25 appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within  
 26 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*  
 27 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

28 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has  
 made a substantial showing of the denial of a constitutional right." With respect to  
 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists  
 would find the district court's assessment of the constitutional claims debatable or  
 wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463

1 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable  
2 jurists could debate (1) whether the petition states a valid claim of the denial of a  
3 constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

4 Having reviewed its determinations and rulings in adjudicating Goode's petition, the  
5 court finds that none of those rulings meets the *Slack* standard. The court therefore  
6 declines to issue a certificate of appealability for its resolution of Goode's petition.

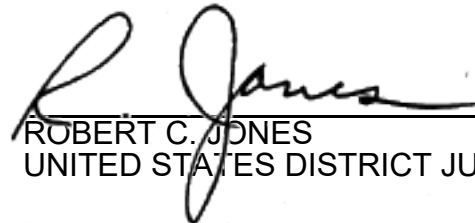
7 **V. Conclusion**

8 **IT IS THEREFORE ORDERED** that the petition (ECF No. 7) is **DENIED**.

9 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

10 **IT IS FURTHER ORDERED** that the Clerk enter judgment accordingly and close this  
11 case.

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14 DATED: 29 March 2022.

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16   
17 ROBERT C. JONES  
18 UNITED STATES DISTRICT JUDGE  
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